NO. 94346-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL DAVID MURRAY,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Constitutional Provisions

Federal:

Statutes

Washington State:

Rules and Regulations

Washington State:

Other Authorities

A. INTRODUCTION

Murray has for decades exposed his genitalia to women and children. In this case, a jury convicted Murray of three counts of felony indecent exposure for searching out isolated women, baring his penis, and masturbating in front of them. The jury convicted Murray of committing the crimes with sexual motivation and rapid recidivism. The trial court imposed an exceptional sentence of 36 months total confinement.

Murray seeks reversal of his sentence, arguing that the sexual motivation aggravating circumstance cannot apply to indecent exposure, that the aggravating circumstances are subject to a constitutional vagueness challenge, and that the rapid recidivism aggravating circumstance is unconstitutionally vague as applied to him.

Murray's claim fails on all counts. Sexual motivation is not inherent in the crime of indecent exposure because sexual gratification is not an element of the offense. Further, this Court has long held, and United States Supreme Court has recently confirmed, that aggravating circumstances are not subject to a federal due process vagueness challenge because the trial court's decision to impose an exceptional sentence is discretionary. Even if Murray could raise a vagueness challenge, his claim fails because a person of ordinary intelligence would not have to guess that reoffending two weeks after being released from jail could lead

to an aggravated sentence. Murray's exceptional sentence should be affirmed.

B. ISSUES PRESENTED

1. Whether the sexual motivation aggravating circumstance applies to indecent exposure?

2. Whether State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003) – holding that the aggravating circumstances are not subject to a vagueness challenge because exceptional sentences are discretionary – remains correct under recent Supreme Court jurisprudence?

3. If not, whether the rapid recidivism aggravating circumstance is sufficiently clear as applied to Murray where he reoffended two weeks after his release from jail?

C. STATEMENT OF THE CASE

Murray was released from the King County Jail on February 17, 2015. RP 477.[1] Two weeks later, he exposed his penis three times in six days.

On March 4, 2015, Murray walked into a nearby retirement home and went to the 24th floor, where he found S.L. setting up for an event. RP

[1] The Verbatim Report of Proceedings consists of eight volumes. The first volume, dated August 12, 2015, is irrelevant to the issues raised on appeal. The last volume, dated December 10, 2015, is a transcript of the sentencing hearing and is designated as 12/10/15RP. The remaining intervening volumes contain the trial transcripts, are consecutively paginated, and designated as RP.

376-78, 382-84, 406. S.L. mistakenly thought that Murray was part of a group of prospective residents touring the room. RP 384. After Murray and the group left, S.L. heard a door open and saw Murray peeking out at her from behind a wall. RP 387, 390-91. S.L. returned to her work, but was interrupted by strange "swishy" noises coming from Murray's direction. RP 391. S.L. looked over and saw Murray facing her while masturbating with his pants down around his legs. RP 391-92. S.L. fled and later identified Murray from a photo montage.[2]

The next day, March 5, 2015, Murray trailed C.Y. into the lobby of her downtown Seattle office building and onto the elevator. RP 447-49. C.Y. looked over at Murray when she realized that she was alone with him and that he had not pressed any buttons. RP 449, 452. Murray's penis was hanging out of his pants. RP 452. C.Y. quickly exited the elevator, and identified Murray from a photo montage shortly thereafter.[3] RP 453-54, 459-60.

A few days later, on March 9, 2015, L.S. was cutting a customer's hair a block away when she saw Murray standing in the hallway, staring at her, with his fly down. RP 307, 332-33, 337, 445. Over the next three hours, Murray returned five or six times to the same spot, standing and

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[2] Surveillance video confirmed that Murray entered the retirement home and left 30 minutes later. RP 397-99.

[3] Surveillance footage captured Murray following C.Y. into the building. RP 456-58.

staring at L.S. with his fly down. RP 338-40. L.S. returned from lunch and found two fresh handprints and a face print on her glass door.[4] RP 341.

Shortly thereafter, L.S. began cutting a young woman's hair, K.N., who saw Murray walk by three to four times, stop, and stare at her, giving K.N. a "creepy" feeling. RP 422-23. K.N. "freaked out" when she looked over and saw Murray gazing intently at her and L.S. "with his dick out . . . masturbating." RP 427. L.S. chased Murray down, taking his picture with her cell phone, and yelling that he had "f—ked with the wrong woman and that he was going to get caught." RP 347.

Based on these incidents, the State charged Murray with three counts of felony indecent exposure predicated on his prior conviction for indecent liberties.[5] CP 17-18. The State alleged that Murray committed all three counts with sexual motivation and rapid recidivism. Id.

The State introduced at trial, pursuant to ER 404(b), the testimony of three other women previously subjected to Murray's indecent exposures.[6] The first victim explained that she was taking the bus to work

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[4] L.S. knew that the prints were fresh because she checked her glass door twice a day since "nobody wants to walk into a dirty salon." RP 341.

[5] A prior sex offense conviction elevates an indecent exposure conviction from a misdemeanor to a Class C felony. RCW 9A.88.010(2)(c).

[6] The trial court admitted the testimony as proof that Murray knew his actions would cause reasonable affront or alarm, and proof that he acted with sexual motivation. CP 74; RP 84-94.

when Murray sat down across the aisle from her on a near-empty bus, and began looking at her and masturbating. RP 565-66. The second victim testified that she was sitting alone in an office lobby when she looked up and saw Murray staring at her while masturbating. RP 631-34. The final victim was working alone at her desk at a homeless shelter when she felt something behind her, turned around, and saw Murray with his pants unzipped and his penis in his hand. RP 556-57.

Murray pursued a diminished capacity defense at trial, arguing that a stroke in 2008 prevented him from knowing that his actions would cause reasonable affront and alarm. RP 678, 687. Dr. Craig Beaver, a forensic psychologist, opined that Murray lacked inhibition and knowledge about the impact of his actions as a result of his stroke. RP 486, 522. Beaver admitted, however, that Murray's history of lewd behavior and indecent exposure *predated* his stroke, and spanned over 20 years. RP 531, 540, 544, 551. The jury rejected Murray's diminished capacity defense and found him guilty as charged. CP 59-64.

At sentencing, the State sought a 48-month exceptional sentence based on Murray's rapid recidivism and predatory pattern of stalking his victims and waiting for them to be alone or isolated before exposing himself and masturbating. 12/10/15RP 3-4. Although Murray did not believe that an exceptional sentence was "warranted," he asked the court

to impose a 16-month exceptional sentence to allow him additional time to develop a release plan. 12/10/15RP 10. The court imposed an exceptional sentence upward of 36 months, finding that it would impose the same sentence based on either aggravating circumstance. CP 97, 99.

On appeal, Murray raised multiple challenges to his exceptional sentence. The Court of Appeals, Division One, affirmed. State v. Murray, No. 74422-4-I, 2017 WL 888583 (Wash. Ct. App. Mar. 6, 2017) (unpublished). This Court granted Murray's petition for review in part, limiting its consideration to two issues: "(1) the sexual motivation aggravating factor, and (2) the vagueness challenge to the 'rapid recidivism' aggravating factor." Order, State v. Murray, No. 94346-0 (Aug. 2, 2017).

D. ARGUMENT

Murray seeks reversal of his exceptional sentence, arguing that the sexual motivation and rapid recidivism aggravating circumstances were insufficient to support his sentence. Because the trial court concluded that it would have imposed the same sentence based on either aggravating circumstance, Murray's sentence must be affirmed unless he successfully demonstrates that *both* aggravating circumstances were invalid. CP 97; State v. Jackson, 150 Wn.2d 251, 276, 76 P.3d 217 (2003). For the

reasons discussed more fully below, Murray cannot carry this burden. This Court should affirm Murray's exceptional sentence.

1. THE SEXUAL MOTIVATION AGGRAVATING CIRCUMSTANCE APPLIES TO INDECENT EXPOSURE.

Murray contends that the sexual motivation aggravating circumstance cannot apply to indecent exposure because the offense is inherently sexual. Murray's claim fails under a plain and common sense reading of the relevant statutes. As Murray concedes, there is no statutory bar to alleging the sexual motivation finding because indecent exposure is not categorized as a "sex offense." Further, indecent exposure requires the open and obscene display of genitalia, but it does not require sexual gratification, which is required to prove sexual motivation. By choosing not to classify indecent exposure as a sex offense, and by defining it without the sexual gratification element, the Legislature has evinced its intent that the sexual motivation aggravating circumstance apply to indecent exposure.

In 1990, the Legislature enacted the Community Protection Act "to fill a perceived gap in the criminal code not covered by existing sex offense crimes."[7] State v. Halstien, 122 Wn.2d 109, 115, 121, 857 P.2d

[7] "The Washington Community Protection Act was born of personal tragedy, public outrage, and unspeakable cruelty . . . following the murder of a young Seattle woman by a work release inmate with a history of violent sexual offenses and the brutal assault and

270 (1993). One of the provisions required the State to file a special allegation in "every criminal case" other than sex offenses, where the defendant committed the crime for sexual gratification. LAWS OF 1990, ch. 3, §§ 601, 602 (codified at RCW 9.94A.835(1), RCW 9.94A.030(48)). The Legislature enacted the sexual motivation statute to hold a defendant who commits a crime for the purpose of sexual gratification more culpable than a defendant who commits the same crime without that motivation. Halstien, 122 Wn.2d at 124.

The Legislature expressly provided that a sexual motivation finding "shall not be applied to sex offenses as defined in RCW 9.94A.030" because the presumptive sentence for a sex offense already takes into account the inherent sexual nature of the offense. LAWS OF 1990, ch. 3, § 601 (codified at RCW 9.94A.835(2)); State v. Thomas, 138 Wn.2d 630, 635-36, 980 P.2d 1275 (1999). Requiring an additional sexual motivation finding would be "redundant," and violate the well-established sentencing principle that only substantial and compelling factors, other than those necessarily considered by the Legislature in determining the standard sentencing range, justify an exceptional sentence. Thomas, 138 Wn.2d at 635-36.

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mutilation of a young Tacoma boy by a recently released sex offender." Norm Maleng, The Community Protection Act and the Sexually Violent Predators Statute, 15 U. Puget Sound L. Rev. 821 (1992).

Significantly, the Legislature has never categorized indecent exposure as a "sex offense," despite amending the statutory definition multiple times, and twice broadening it to include additional offenses. See LAWS OF 1995, ch. 268, § 2; LAWS OF 1999, ch. 352, § 8 (adding comparable felony sex offense convictions in effect prior to July 1, 1976); LAWS OF 2001, ch. 95, § 1; LAWS OF 2006, ch. 139, § 5; LAWS OF 2010, ch. 267, § 9 (adding felony failure to register as a sex offender), LAWS OF 2015, ch. 261, § 12. Indeed, nearly all of the designated "sex offenses," involve sexual conduct, intercourse, arousal, or gratification.[8] RCW 9.94A.030(47). Thus, for nearly 30 years, the Legislature has mandated that the State allege sexual motivation in every indecent exposure prosecution where "sufficient admissible evidence exists." RCW 9.94A.835(1).

Nonetheless, Murray asks this Court to read indecent exposure into the statutory definition of a "sex offense" because it is "an inherently sexual offense." Pet. at 10. Murray's argument misses the mark. Nothing in the statute criminalizing indecent exposure, or the relevant case law, suggests that an exposure must be committed for purposes of sexual gratification.

[8] The exceptions are failure to register as a sex offender and criminal trespass against children, both of which involve offenders who are required to register based on their prior sex offense convictions. RCW 9A.44.132(1); RCW 9A.44.190(5).

A person commits indecent exposure if he "intentionally makes any open and obscene exposure" of "his person" knowing that such conduct is "likely to cause reasonable affront or alarm." RCW 9A.88.010(1). Although the statute does not define the phrase "any open and obscene exposure of his or her person," Washington common law has defined it as "a lascivious exhibition of those private parts of the person which instinctive modesty, human decency, or common propriety require shall be customarily kept covered in the presence of others." State v. Vars, 157 Wn. App. 482, 490, 237 P.3d 378 (2010) (quoting State v. Galbreath, 69 Wn.2d 664, 668, 419 P.2d 800 (1966)).

Washington courts have never equated lascivious exposure with sexual gratification. See Vars, 157 Wn. App. at 491 (recognizing the "gravamen" of indecent exposure is "an intentional and 'obscene exposure' in the presence of another that offends society's sense of 'instinctive modesty, human decency, and common propriety'") (quoting Galbreath, 69 Wn.2d at 668).

This makes sense because there are multiple factual scenarios that satisfy the elements of indecent exposure, but do not involve sexual gratification, including: (1) flashing a passerby for shock value, (2) streaking naked across a college campus, (3) mooning someone out a car window, (4) riding a bike unclothed in a parade to celebrate the summer

solstice, (5) yelling "suck my dick" while displaying one's penis, or (6) standing nude outside the Republican National Convention as a political protest.[9] The purpose of the sexual motivation aggravating circumstance is to hold those offenders who commit indecent exposure for the purpose of sexual gratification more culpable than those offenders who commit the same crime without such motivation. Thomas, 138 Wn.2d at 636.

Murray mistakenly relies on State v. Steen, 155 Wn. App. 243, 228 P.3d 1285 (2010) to advance his claim. In Steen, Division Two of the Court of Appeals considered whether a jury instruction defining "obscene exposure" as "the exposure of the sexual or intimate parts of one's body for a sexual purpose," amounted to a comment on the evidence. Id. at 246-47. The court answered in the negative, following a short, two-sentence analysis of the claim. Id. at 247.

In concluding that the instruction "contained neither facts . . . nor the trial court's belief or disbelief in any testimony," the Steen court noted in passing that the instruction provided "a neutral and accurate statement of the law." Id. The court's singular statement regarding the accuracy of the instruction is dicta and non-binding, because it is unnecessary to the

[9] Although not widely reported, on July 17, 2016, 100 women stood naked outside the Republican National Convention to peacefully protest the Republican nominee's "hateful rhetoric" toward women. Available at http://www.huffingtonpost.com/entry/100-women-just-got-naked-together-at-the-republican-national-convention_us_578cc902e4b0867123e1bf86 (last visited August 26, 2017) (*Warning:* nude photos).

court's holding that the instruction was not a comment on the evidence. See State v. Halgren, 137 Wn.2d 340, 346 n.3, 971 P.2d 512 (1999) (court's comments that are immaterial to the outcome of the case are dicta). Steen sheds little light here given its inapposite facts and failure to address the issue presented here, whether the sexual motivation aggravating circumstance applies to indecent exposure.

Murray's claim fails because indecent exposure is not categorized as a sex offense, and does not require the more culpable mental state of acting for the purpose of sexual gratification.

2. MURRAY'S VAGUENESS CHALLENGE FAILS.

Alternatively, Murray claims that the trial court erred by imposing an exceptional sentence based on the rapid recidivism aggravating circumstance because it is unconstitutionally vague under the federal due process clause.[10] Murray is mistaken. The exceptional sentence aggravating circumstances are not subject to a void-for-vagueness challenge under this Court's well established precedent in Baldwin. Murray cannot show that Baldwin is incorrect and harmful, particularly given recent United States Supreme Court precedent confirming that discretionary sentencing guidelines are not subject to vagueness review. Even if Murray could raise a vagueness challenge, his claim would fail

[10] Murray has not raised a state constitutional challenge.

because the rapid recidivism aggravating circumstance was not unconstitutionally vague as applied to him.

a. Baldwin Remains Good Law.

Nearly 25 years ago, this Court unanimously held in Baldwin that the exceptional sentence guidelines[11] are not subject to a vagueness challenge because they do not define conduct, allow for arbitrary arrest and prosecution, or set penalties. 150 Wn.2d at 459 ("the due process considerations that underlie the void-for-vagueness doctrine have no application in the context of sentencing guidelines"). Critically, the court held that the exceptional sentence guidelines do not create a "constitutionally protectable liberty interest" because they "are intended only to structure discretionary decisions affecting sentences," and do not require that a specific sentence be imposed. Id. at 461.

To reach this conclusion, the Baldwin court overruled its prior decision in State v. Rhodes, 92 Wn.2d 755, 600 P.2d 1264 (1979), holding that the juvenile exceptional sentence guidelines created a constitutionally protectable liberty interest. The Baldwin court reasoned that Rhodes was "incorrect" in light of contrary United States Supreme Court and state

[11] Baldwin considered two sentencing statutes: (1) former RCW 9.94A.120(2) (2000), which provided for the imposition of a standard range sentence unless substantial and compelling reasons justified an exceptional sentence, and has since been recodified as RCW 9.94A.505, and (2) former RCW 9.94A.390 (2000), which provided a nonexclusive list of mitigating and aggravating circumstances justifying an exceptional sentence, and has since been recodified as RCW 9.94A.535.

supreme court precedent, and "harmful" because "it would turn every guideline into a constitutionally protected liberty interest."[12] Id. at 459-61.

Since Baldwin, the Court of Appeals has routinely rejected vagueness challenges to the aggravating circumstances, and has not questioned Baldwin's endurance, even post-Blakely.[13] E.g., State v. Chanthabouly, 164 Wn. App. 104, 141-42, 262 P.3d 144 (2011); State v. Baker, No. 71034-6-I, slip op. at 12, 2015 WL 6872168 (Wash. Ct. App. Nov. 9, 2015) (unpublished); State v. Wilcox, No. 71620-4-I, slip op. at 3, 2015 WL 3855234 (Wash. Ct. App. June 22, 2015) (unpublished).

Indeed, the Court of Appeals has twice held, without reference to Baldwin, that the rapid recidivism aggravating circumstance was *not* unconstitutionally vague as applied to the facts of each case. State v. Williams, 159 Wn. App. 298, 319-20, 244 P.3d 1018 (2011) (Division One) (defendant reoffended within 24 hours of release); State v. Zigan, 166 Wn. App. 597, 604-05, 270 P.3d 625 (2012) (Division Three) (defendant reoffended two months after his release).

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[12] Notably, multiple Court of Appeals decisions questioned Rhodes's underpinnings prior to its reversal in Baldwin. E.g., State v. Jacobson, 92 Wn. App. 958, 966-67, 965 P.2d 1140 (1998) (cited approvingly in Baldwin, 150 Wn.2d at 458); State v. Wilson, 96 Wn. App. 382, 393-95, 980 P.2d 244 (1999); State v. Owens, 95 Wn. App. 619, 631-32, 976 P.2d 656 (1999).

[13] In Blakely, the United States Supreme Court held that any fact that increases the penalty for a crime beyond the statutory maximum, other than a prior conviction, must be submitted to the jury and proved beyond a reasonable doubt. 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

This Court has only once referenced Baldwin, noting in passing the "broad question of whether Baldwin survives Blakely," without resolving it. State v. Duncalf, 177 Wn.2d 289, 296, 300 P.3d 352 (2013). Murray has never relied on Blakely to support his claim; consequently, this case does not present it. See RAP 10.3(a)(6) (requiring parties to provide argument and legal citations in support of the issues presented for review).

Rather, Murray argues that Baldwin is "no longer good law" solely based on the United States Supreme Court's decision in Johnson v. United States, despite its inapposite facts, and more recent jurisprudence from the same court confirming that discretionary sentencing guidelines are immune from vagueness attacks. Pet. at 17; __ U.S. __, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015). In Johnson, the court struck down a provision of the Armed Career Criminal Act (ACCA) *requiring* a sentencing court to impose a 15-year minimum sentence as unconstitutionally vague. 135 S. Ct. at 2557.

Two years later, the court held in Beckles v. United States, that an identically worded provision of the federal sentencing guidelines was not amenable to a vagueness challenge because it did not mandate an aggravated sentence. __ U.S. __, 137 S. Ct. 886, 890, 892, 197 L. Ed. 2d (2017). The court distinguished its Johnson holding as follows:

> In Johnson, we applied the vagueness rule to a statute fixing permissible sentences. The ACCA's residual clause . . . required sentencing courts to increase a defendant's prison term . . . to a minimum of 15 years. That requirement thus fixed – in an impermissibly vague way – a higher range of sentences for certain defendants . . .
>
> Unlike the ACCA, however, the advisory Guidelines do not fix the permissible range of sentences. To the contrary, they merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range. Accordingly, the Guidelines are not subject to a vagueness challenge under the Due Process Clause.

Id. at 892.

Thus, the Beckles court reaffirmed what this Court held over two decades ago in Baldwin: "laws that dictate particular decisions given particular facts can create liberty interests, but laws granting a significant degree of discretion cannot." 150 Wn.2d at 460 (quoting In re Pers. Restraint of Cashaw, 123 Wn.2d 138, 144, 866 P.2d 8 (1994)). In other words, the aggravating circumstances do not create a "constitutionally protected liberty interest" because they merely guide the trial court's discretion to impose an exceptional sentence, and do not require that one be imposed.[14] See RCW 9.94A.535 (providing the court "may" impose an exceptional sentence); RCW 9.94A.537(6) (providing the court "may" impose an exceptional sentence above the standard range if "substantial

[14] For example, in State v. Siers, the jury found the existence of an aggravating factor but the trial court declined to impose an exceptional sentence. 174 Wn.2d 269, 272-73, 274 P.3d 358 (2012).

and compelling reasons" justify it). Murray neither acknowledges, nor attempts to distinguish, Beckles, despite it being decided one month prior to him filing his petition for review.

Moreover, Murray has never argued that Baldwin is incorrect and harmful, as required to overturn established precedent. State v. Kier, 164 Wn.2d 798, 804, 194 P.3d 212 (2008). Under *stare decisis*, a court must adhere to a prior ruling unless the party seeking to set aside the decision can make "a clear showing" that the rule is "incorrect and harmful." In re Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). Murray cannot meet this high standard, particularly since the legal underpinnings of Baldwin have been bolstered by Beckles. See State v. Johnson, __ Wn.2d __, 399 P.3d 507, 515 (2017) (refusing to overturn state law precedent where its legal underpinnings remained intact). The aggravating circumstances are not subject to vagueness review.

b. Alternatively, The Rapid Recidivism Aggravating Circumstance Is Not Unconstitutionally Vague As Applied To Murray.

Even if the aggravating circumstance statute is subject to a vagueness challenge, Murray's claim fails on this record and in light of jurisprudence holding that the rapid recidivism aggravating circumstance is not unconstitutionally vague.

A statute is presumed to be constitutional and will be upheld on appeal unless the party challenging it proves that the statute is unconstitutional beyond a reasonable doubt. City of Seattle v. Eze, 111 Wn.2d 22, 26, 759 P.2d 366 (1988). Under the federal due process clause, a statute is void for vagueness if it either (1) fails to define a criminal offense with sufficient definiteness that a person of ordinary intelligence can understand it, or (2) it does not provide standards sufficiently specific to prevent arbitrary enforcement. City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990).

A statute is constitutional if people of ordinary intelligence can understand what the statute proscribes or requires, notwithstanding some possible areas of disagreement. Id. at 179; Grayned v. Rockford, 408 U.S. 104, 110, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) ("Condemned to the use of words, we can never expect mathematical certainty from our language."). Vagueness challenges to a statute that do not involve First Amendment are evaluated as applied to the particular facts of the case. Douglass, 115 Wn.2d at 182.

Here, the rapid recidivism aggravating circumstance is not unconstitutionally vague as applied to Murray. Murray committed three counts of indecent exposure two weeks after being released from the King County jail. RP 332, 408-11, 447, 477. A person of common intelligence

would not have to guess that reoffending two weeks after being released from jail could lead to an exceptional sentence under RCW 9.94A.535(3)(t). See Williams, 159 Wn. App. at 320 (rapid recidivism aggravating circumstance not unconstitutionally vague as applied to a defendant who reoffended within 24 hours of being released from jail); Zigan, 166 Wn. App. at 604-05 (same where defendant reoffended two months after release).

Nonetheless, Murray argues that the rapid recidivism aggravating circumstance was unconstitutionally vague as applied to him because the statute does not define "shortly after," and thereby operates "just as a disfavored strict liability crime would." Pet. at 16. Murray is mistaken.

The fact that a term is undefined does not automatically mean that the statute is unconstitutionally vague. Douglass, 115 Wn.2d at 180; see Sproles v. Binford, 286 U.S. 374, 393, 52 S. Ct. 581, 76 L. Ed. 1167 (1932) (approving "the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding"). A statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions constitute prohibited conduct. State v. Watson, 160 Wn.2d 1, 7, 154 P.3d 909 (2007). Further, Murray's analogy to a strict liability crime fails given

that a trial court is under no obligation to impose an exceptional sentence. RCW 9.94A.537(6).

Based on the record and the case law, Murray's argument falls far short of demonstrating the rapid recidivism aggravating circumstance is unconstitutional beyond a reasonable doubt. Eze, 111 Wn.2d at 28 (recognizing that "the presumption in favor of a law's constitutionality should be overcome only in exceptional cases").

D. CONCLUSION

For the foregoing reasons, the Court should affirm Murray's exceptional sentence.

DATED this 15th day of September, 2017.

Respectfully submitted,

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 15 day of September, 2017.

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